RECENT CASES

Alimony—Modification of Lump Sum Settlements—[New Jersey].—In 1918 a divorce decree nisi was entered between the parties which awarded the wife temporary alimony at the rate of $50.00 per month. This decree was modified by a decree of 1919 which, stating by way of recital that the parties had reached an agreement as to the payment of a lump sum in lieu of alimony, ordered the deletion from the original decree nisi of the provision for alimony. In 1920, the decree nisi was made final. Seventeen years later the wife petitioned to amend the decree so as to include a provision for alimony. *Held*, for petitioner as a matter of discretion but not of right. *Parmly v. Parmly*.[1]

This decision is contrary to the prevailing rule regarding the power of courts to modify lump sum settlements, but may be justified under a New Jersey statute[2] which provides, in effect, that the court of chancery may entertain a petition for alimony subsequent to a divorce decree.[3]

Where the parties agree to a lump sum settlement in lieu of alimony,[4] two situations must be distinguished regarding modification by the court after the decree has been rendered.[5] *First*, if the agreement was incorporated into the decree, there is some authority[6] that the court retains jurisdiction to modify it under a widely adopted provision in divorce statutes authorizing courts to modify alimony allowances at any

[1] 1 A. (2d) 646 (N.J. 1938).

[2] N.J. Rev. Stat. 1937, § 2:50–37. See note 16 *infra*.

[3] "Pending a suit for divorce, or after decree of divorce, the court of Chancery may make such order touching the alimony of the wife . . . . as the circumstances of the case shall render fit, reasonable and just." Even in the absence of such an agreement, the court may order the payment of alimony in one lump sum where there is a statute to that effect.

[4] Thirteen states have such statutes authorizing alimony in gross: Ariz. Rev. Code 1933, § 3–1218; Del. Rev. Code 1935, § 3512; Ind. Burns, Ann. Stat. 1933, § 3–1218; Kan. Gen. Stat. 1935, § 60 (1511); Me. Rev. Stat. 1930, c. 73, § 9; Mich. Comp. L. 1929, § 12745; Mo. Rev. Stat. 1929, §§ 1355, 1356; N.H. Pub. L. 1926, c. 287, § 16; N.M. Stat. Ann. 1929, § 68 (506); Ohio, Page Ann. Gen. Code 1936, §§ 11990, 11991, 11992, 11993; Okla. Comp. Stat. 1931, § 672; Ore. Code 1930, § 6 (914); Vt. Pub. L. 1933, § 3155. In other jurisdictions the power to make such an award has been implied from the general statutes requiring maintenance of the wife. Calame v. Calame, 25 N.J. Eq. 548 (1874); Sobel v. Sobel, 99 N.J. Eq. 376, 132 Atl. 603 (1926); Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684 (1929); Plaster v. Plaster, 47 Ill. 290 (1868).

[5] In the absence of statute, a court ordinarily loses jurisdiction to modify a judgment or decree after expiration of the term at which the judgment or decree was entered. 1 Black, Judgments § 154 (1902).

[6] Kunker v. Kunker, 230 App. Div. 641, 246 N.Y. Supp. 118 (1930); Herrick v. Herrick, 319 Ill. 146, 149 N.E. 820 (1925); Skinner v. Skinner, 205 Mich. 243, 171 N.W. 383 (1919); Warren v. Warren, 116 Minn. 458, 133 N.W. 1009 (1911); see also note 44 Harv. L. Rev. 127 (1931). It is to be noted that in these cases the decree awarded alimony payments as well as a lump sum settlement and that the modification went only to the alimony payments. But see Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033 (1913).

time,[7] but in most jurisdictions this provision has not been so interpreted.[8] *Second*, if the agreement is not made part of the decree, the decisions agree (except in New Jersey) in holding that the court lacks jurisdiction to modify,[9] possibly upon the theory that the matter has been taken out of the hands of the court by the private agreement.[10]

According to the majority view, in both situations the wife precludes herself by an out-of-court agreement from invoking the aid of the court to obtain maintenance from her former husband.[11]

In the instant case it is evident that even in New Jersey[12] the petitioner has waived her right to claim from her former husband maintenance, *i.e.*, support according to the standard to which she was accustomed. The controversial point, however, is whether by such agreement she waives her right to a claim against him for bare sustenance when she is about to become a public charge. In effect, the litigation in the instant case is between the State and the former husband as to who shall be visited with the burden of the petitioner's sustenance. The New Jersey court apparently felt that despite the waiver by the agreement, which completely ended the marital status, the respondent continued to owe to the State an obligation to prevent the petitioner from becoming a burden upon the taxpayers.

In some jurisdictions it was held that a divorce decree in a case where there is service by publication[13] and into which an alimony provision cannot be incorporated[14]

[7] The prevailing rule is that the court cannot alter the *decree unless power* to do so was reserved therein, or unless there is a general statutory authority. Thirty-one American jurisdictions have such a statute. See Vernier, American Family Law § 106 (1932).

[8] Plaster v. Plaster, 47 Ill. 290 (1868); Clough v. Long, 8 Ohio App. 420 (1918); Henderson v. Henderson, 37 Ore. 141, 60 Pac. 577 (1900); Wallace v. Wallace 74 N.H. 256, 67 Atl. 580 (1907); Erwin v. Erwin, 179 Ark. 192, 14 S.W. (2d) 1100 (1929); Marshall v. Marshall, 236 S.W. 378 (Mo. 1922); Beard v. Beard, 57 Neb. 754, 78 N.W. 255 (1899); Kraft v. Kraft, 193 Iowa 602, 187 N.W. 449 (1922); Booth v. Booth, 114 Kan. 377, 219 Pac. 513 (1923).

[9] Smith v. Johnson, 321 Ill. 134, 151 N.E. 550 (1926); Kunker v. Kunker, 230 App. Div. 641, 246 N.Y. Supp. 118 (1930); Johnson v. Johnson, 206 N.Y. 561, 100 N.E. 408 (1912); Brown v. Brown, 132 Ga. 712, 64 S.E. 1092 (1909); Biery v. Steckel, 194 Pa. St. 445, 45 Atl. 376 (1900). See Lindey, Separation Agreements 234 (1937).

[10] Kunker v. Kunker, 230 App. Div. 641, 246 N.Y. Supp. 118 (1930) and cases cited therein. See note 9 *supra*.

[11] Plaster v. Plaster, 47 Ill. 290 (1868); Wallace v. Wallace, 74 N.H. 256, 67 Atl. 580 (1907); Brown v. Brown, 132 Ga. 712, 64 S.E. 1092 (1909); Guess v. Smith, 100 Miss. 457, 56 So. 166 (1914).

[12] Greenberg v. Greenberg, 99 N.J. Eq. 461, 133 Atl. 768 (1928); Sobel v. Sobel, 99 N.J. Eq. 376, 132 Atl. 603 (1926); Irwin v. Irwin, 98 N.J. Eq. 454, 131 Atl. 304 (1925).

[13] A divorce decree which is in the nature of an *in rem* decree, may be entered by a court on constructive service without acquiring actual personal jurisdiction of a non-resident defendant Woodcock v. Woodcock, 169 Md. 40, 179 Atl. 826 (1935); Cook v. Cook, 56 Wis. 195, 14 N.W. 33, 443 (1882); 2 Black, Judgments §§ 925, 933 (1902).

[14] It is generally held that the question of alimony must be litigated in a divorce proceeding and that a decree silent on alimony is *res judicata* on that question. Kelley v. Kelley, 317 Ill. 104, 147 N.E. 659 (1925); Spain v. Spain, 177 Iowa 249, 158 N.W. 529 (1916); McFarlane v. McFarlane, 43 Ore. 477, 73 Pac. 203 (1903); Monross v. Monross, 129 Mich. 27, 87 N.W. 1035 (1901); Bassett v. Bassett, 99 Wis. 344, 74 N.W. 780 (1898); Howell v. Howell, 104 Cal. 45,

is *res judicata* on the alimony question.[15] The New Jersey statute was probably designed to prevent such a ruling in that jurisdiction.[16] The court avoided the contemplated effect of the lump sum settlement by extending the application of the statute to the instant case. Other jurisdictions have adopted the opposite view.[17] In the absence of statute, these courts place the burden upon the taxpayers upon the theory that because of the lump sum settlement the wife has no more claim on her former husband for this minimum support than she has on any other man in the community.[18]

Attorney and Client—Reasonable Fee—Factors To Be Considered—[Wisconsin].—An attorney, having successfully defended his client in a $48,000 tax suit brought by the federal government, sought to recover $16,025.06 in fees on the basis of an oral contingent fee contract. The client, admitting an oral contract, denied any provision therein for a contingent fee, claiming that the contract was for reasonable value only. The jury returned a verdict of $14,422.57 for the attorney. On appeal, *held*, reversed. The evidence being insufficient to support a contingent fee contract, the attorney is entitled only to the reasonable value of his services. The jury's verdict, amounting to $641 a day for 28 days' services, is excessive. The maximum reasonable fee is $50 a day for office work, $100 a day for work requiring absence from the office. *Podell v. Gronik*.[1]

Although in England, barristers cannot enforce payment for their services,[2] the opposite rule is well established in the United States as regards attorneys.[3] In computing the amount of compensation to which an attorney is entitled, resort must often be had to the rather indefinite standard of "reasonable value." The most frequently occurring situations in which this standard is applied are where legal services are rendered to a client with no definite fee stipulated[4] where the contract of employment

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37 Pac. 770 (1894). However, since an alimony provision has, an *in personam* operation, such provision may not properly be incorporated into an *ex parte* divorce decree where the defendant has only had constructive service. Proctor v. Proctor, 215 Ill. 275, 74 N.E. 145 (1905); Rigney v. Rigney, 127 N.Y. 408, 28 N.E. 405 (1891); 2 Black, Judgments §§ 925, 933 (1902).

[15] That it is *res judicata:* Kelley v. Kelley, 317 Ill. 104, 147 N.E. 659 (1925); Doeksen v. Doeksen, 202 Iowa 489, 210 N.W. 545 (1926); Thompson v. Thompson, 226 U.S. 551 (1913); Joyner v. Joyner, 131 Ga. 217, 62 S.E. 182 (1908); McFarlane v. McFarlane, 43 Ore. 477, 73 Pac. 203 (1903); Howell v. Howell, 104 Cal. 45, 37 Pac. 770 (1894). But see Hutton v. Dodge, 58 Utah 228, 198 Pac. 165 (1921); Cox v. Cox, 19 Ohio St. 502 (1869). Also see note 10 Minn. L. Rev. 254 (1928) and 4 Wis. L. Rev. 226 (1927).

[16] Other jurisdictions having similar statutes are Massachusetts (Mass. G. L. 1932, c. 208, § 34) and Rhode Island. (R.I. G.L. 1923, § 4216).

[17] Note 8 *supra*.

[18] See Plaster v. Plaster, 47 Ill. 290, 294 (1868).

[1] 282 N.W. 53 (Wis. 1938).

[2] Kennedy v. Brown, 13 C.B. (N.S.) 677 (1863); Turner v. Phillips, 1 Pea. 166 (1792); Mowat v. Brown, 19 Fed. 87 (C.C. Minn. 1884).

[3] Crozier v. Freeman Coal Min. Co., 363 Ill. 362, 2 N.E. (2d) 293 (1936); *In re* Pitman's Guardianship, 120 Okla. 199, 250 Pac. 1015 (1926); Taft v. Thomajan, 249 Mass. 299, 144 N.E. 228 (1924).

[4] Kline v. Blackwell, 63 F. (2d) 897 (C.C.A. 5th 1933), *certiorari den.* 290 U.S. 636 (1933); Page v. Avila, 55 R.I. 52, 177 Atl. 541 (1935); Elconin v. Yalen, 208 Cal. 546, 282 Pac. 791 (1929); F. L. Stitt & Co. v. Powell, 94 Fla. 550, 114 So. 375 (1927).